

Before the
Federal Communications Commission
Washington, D.C. 20554

Oct 23 1 52 PM '04

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.

(Valley Mills, Teague, Brady, Hico, Meridian,
San Saba, Richland Springs, Texas)

MM Docket No. 01-47

RM-10063

RM-10119

RM-10120

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 20, 2004

Released: October 25, 2004

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the *Notice of Proposed Rule Making*¹ issued at the request of Valley Mills Radio Broadcasting Company ("Petitioner"). Petitioner and Elgin FM Limited Partnership ("Elgin FM Limited") filed supporting comments.² Roy Henderson and Pecan Bayou Radio (collectively "Joint Parties") and Teague Broadcasting Company ("Teague Broadcasting") filed counterproposals.³ Petitioner filed reply comments in response to Teague Broadcasting's counterproposal. Farris Broadcasting, Inc. ("Farris Broadcasting"), licensee of Station KNEL-FM, Channel 237A, Brady, Texas filed reply comments in response to the Joint Parties' counterproposal. The Joint Parties filed reply comments to the *Public Notice*. Petitioner filed Motion for Leave to File Comments. Farris Broadcasting filed responsive comments to a subsequent *Order to Show Cause*.⁴ Roy Henderson filed a Withdrawal of Consent and Support. No other comments or counterproposals were received in this proceeding.

2. **Background.** The *Notice* proposed the allotment of Channel 237C2 at Valley Mills, Texas, as that community's first local service. In response to the *Notice*, Petitioner filed comments reiterating an intention to apply for proposed Channel 237C2 at Valley Mills, if allotted. Elgin FM Limited filed supporting comments. Teague Broadcasting timely filed a counterproposal requesting the allotment of Channel 237C3 to Teague, Texas, as its first local service. Petitioner filed reply comments supporting the proposed Teague allotment and withdrawing its Valley Mills proposal. Petitioner filed a sworn declaration certifying that it has not received, nor is entitled to receive, any money or other consideration, directly or indirectly, in exchange for the request to withdraw its expression of interest in the allocation of Channel 237C2 to Valley Mills, Texas pursuant to Section 1.420(j) of the Commission's rules.⁵ Elgin FM Limited filed a sworn affidavit in compliance with Section 1.420(j) withdrawing its expression of interest in the proposed Valley Mills allotment. The affidavit certified that Elgin FM Limited has received and will not receive, either directly or indirectly, any money or other consideration in connection with the withdrawal of its expression of interest.

¹ Valley Mills, Texas, 16 FCC Rcd 3522 (MMB 2001). ("Notice").

² Elgin FM Limited filed a Withdrawal of Expression of Interest in the proposed Valley Mills allotment.

³ The Joint Parties filed a Partial Withdrawal for Option I of its counterproposal. As such, Option II was placed on *Public Notice*. See *Public Notice*, Report No. 2488, released June 1, 2001.

⁴ Valley Mills, Teague, Brady, Hico, Meridian, San Saba, Richland Springs, Texas, 19 FCC Rcd 10214 (MB 2004).

⁵ See 47 C.F.R. 1.420(j).

3. The Joint Parties originally filed a timely counterproposal containing an Option I and an Option II.⁶ The Joint Parties subsequently filed a Partial Withdrawal for Option I because Roy Henderson withdrew his interest in the reallocation of Channel 237C3 from San Saba to Goldthwaite, Texas, but maintained interest in the Channel 237A substitution at San Saba necessary to accommodate Option II.⁷ Option II requested the allotment of Channel 291A at Richland Springs, Texas, as its second local service, the substitution of Channel 237A for Channel 291A at San Saba and modification of the license of Station KBAL-FM accordingly. This proposed substitution requires the substitution of Channel 296A for Channel 237A at Brady and the modification of the license for Station KNEL-FM to reflect this change. To this end, we issued the *Order to Show Cause* directed to Farris Broadcasting, licensee of Station KNEL-FM to show cause why its license should not be change as proposed herein. Option II also proposed the allotment of Channel 285A at Hico, Texas, as its first local service. This proposed allotment requires the substitution of Channel 237A for vacant Channel 285A at Meridian, Texas.⁸

4. The Joint Parties filed responsive comments stating that the Teague counterproposal was not technically correct when filed because it was short-spaced to the site originally proposed for the Channel 236C2 upgrade for FM Station KNDE at College Station, Texas in MM Docket 91-58. Farris Broadcasting filed responsive comments to the *Order to Show Cause* stating that it objects to the Channel 296A substitution for Station KNEL-FM because it would create extreme listener confusion, and preclude the station from upgrading to a Class C3 allotment. In any event, Farris Broadcasting stated that if the Joint Parties' counterproposal is granted, reimbursement would be a minimum of \$250,000.00. In a subsequent pleading, Roy Henderson filed a withdrawal of consent and support for the proposed Channel 237A substitution at San Saba.

5. **Discussion.** Both counterproposals conflict with the proposed Valley Mills allotment. However, since there are no expressions of interest in this allotment, we will evaluate each counterproposal because these proposals are not mutual exclusive.⁹

6. The proposed Richland Springs allotment requires the substitution of Channel 237A for Channel 291A at San Saba and modification of the license of Station KBAL-FM accordingly. Roy Henderson recently withdrew his expression of interest in the proposed San Saba substitution, in compliance with Section 1.420(j) of the Commission's rules. As such, we will not consider the proposed Richland Springs allotment because Pecan Bayou needed to file the requisite pledge for reimbursement absent Roy Henderson's consent.¹⁰ On the other hand, we will consider the merits of the proposed Hico allotment because it is mutually exclusive with the originally proposed Valley Mills allotment. Pecan

⁶ The Joint Parties' counterproposal was filed on April 9, 2001. On May 11, 2001, we released *Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 16 FCC Rcd 9551 (MMB 2001), in which we announced that after release of the decision in the Federal Register, we would no longer accept petitions for rule making or counterproposals that contain optional or alternative proposals.

⁷ Roy Henderson filed an affidavit pursuant to Section 1.420(j) stating that no agreements, written or oral, express or implied, relating to the dismissal of his expression of interest in applying for Channel 273C3 at Goldthwaite, Texas. Henderson further, states that nor has he been paid or promised any payment or other consideration in exchange for its withdrawal of expression of interest in the proposal Goldthwaite reallocation.

⁸ Channel 285A at Meridian, Texas (FM297) is included among the 290 FM channels listed for auction in FM Auction 37, scheduled to commence November 3, 2004.

⁹ It is Commission policy to refrain from making a new allotment to a community absent an expression of interest. See e.g., *Clarendon, Texas*, 18 FCC Rcd 12701 (MB 2003) and *Jasper, Texas*, 18 FCC Rcd 418 (MB 2003).

¹⁰ See *Circleville, Ohio*, 8 FCC Rcd 2d 159 (1967).

Bayou Radio requested the allotment of Channel 285A at Hico, Texas, as its first local service.¹¹ To accommodate this allotment, Pecan Bayou Radio proposed the substitution of Channel 237A for vacant Channel 285A at Meridian, Texas.

7. Accordingly, we are allotting Channel 285A to Hico, Texas, as its first local service. To accommodate this allotment, we are substituting Channel 237A for vacant Channel 285A at Meridian, Texas. Channel 285A can be allotted to Hico consistent with the Commission's minimum distance separation requirements at city reference coordinates. The reference coordinates for Channel 285A at Hico are 31-58-54 North Latitude and 98-01-54 West Longitude. Channel 237A can be allotted to Meridian consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 7.4 kilometers (4.6 miles) northwest of the community. The reference coordinates for Channel 237A at Meridian are 31-59-07 North Latitude and 97-41-22 West Longitude.

8. Teague Broadcasting filed its counterproposal requesting the allotment of Channel 237C3 to Teague, Texas, as its first local service.¹² The Joint Parties asserted that the Teague counterproposal was not technically correct when filed, citing *Broken Arrow*,¹³ because there was no finality in MM Docket 91-58 because of its pendency before the U.S. Court of Appeals for the D.C. Circuit. The *Report and Order* in MM Docket 91-58 ("KNDE R&O"), upgraded FM Station KNDE, College Station, Texas at a site that would no longer conflict with the proposed Channel 237C3 allotment at Teague. Therefore, the Teague counterproposal was technically correct based on our holding in *Auburn*¹⁴ because the Teague counterproposal was filed after the effective date in the KNDE R&O.¹⁵ Moreover, the proposed Teague allotment is not short-spaced to the license of FM Station KNDE, Channel 236C2, College Station, Texas.¹⁶ Based on the foregoing, we are allotting Channel 237C3 to Teague, Texas, as its first local service. Channel 237C3 can be allotted to Teague, in compliance with the Commission's minimum distance separation requirements provided there is a site restriction of 19.6 kilometers (12.2 miles) north of the community. The reference coordinates for Channel 237C3 at Teague are 31-47-33 North Latitude and 96-12-39 West Longitude.

9. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

10. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective January 5, 2005,¹⁷ the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

¹¹ Hico is an incorporated community with a 2000 Census population of 1,341 persons. Hico has its own mayor and city council and city manager. Hico provides a number of municipal services, including police and fire protection. Hico has its own post office, independent school district, doctors' clinic, public library and a number of commercial businesses.

¹² Teague was incorporated in 1925 and has a 2000 U.S. Census population of 4,557 persons. It is governed by a mayor and five city council members, and served by various city officials. Teague has several civic organizations and commercial businesses.

¹³ *Broken Arrow and Bixby, Oklahoma and Coffeyville, Kansas*, 3 FCC Rcd 6507 (MMB 1988).

¹⁴ See *Auburn, Alabama, et al*, 18 FCC Rcd 10333 (MB 2003) ("Auburn").

¹⁵ See *Caldwell, College Station and Gause, Texas*, 13 FCC Rcd 13772 (1998), *recon. denied*, 15 FCC Rcd 3322 (2000).

¹⁶ See BLH-20030303ABG.

¹⁷ See 47 C.F.R. § 1.427(a) and 47 U.S.C. § 553(d). See, e.g., *Authorization and Use of Software Defined Radios*, 16 FCC Rcd 17373 (2001) (new rules effective 120 days after publication in the Federal Register).

<u>Communities</u>	<u>Channel No.</u>
Hico, Texas	285A
Meridian, Texas	237A
Teague, Texas	237C3

11. The window period for filing applications for Channel 285A at Hico, Texas and Channel 237C3 at Teague, Texas will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order. A filing window for the substituted Channel 237A will not be opened at this time since Channel 285A at Meridian, Texas, Auction No. FM297, is scheduled to be auctioned in Auction No. 37 on November 3, 2004. As such, the ultimate permittee for this allotment is required to file an application specifying Channel 237A in lieu of Channel 285A at Meridian, Texas.

12. IT IS ORDERED, That the Petition for Rulemaking filed by Valley Mills Radio Broadcasting Company proposing the allotment of Channel 237C2 to Valley Mills, Texas IS DISMISSED.

13. IT IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED

14. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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